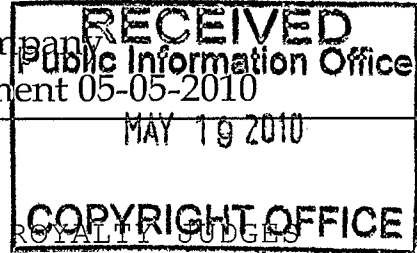


Capital Reporting Company
Motion to Adopt Partial Settlement



1

BEFORE THE UNITED STATES COPYRIGHT
LIBRARY OF CONGRESS
Washington, D.C.

ORIGINAL

-----:
IN THE MATTER OF: :

DIGITAL PERFORMANCE RIGHT in : Docket No. 2009-1
SOUND RECORDINGS and : CRB Webcasting III
EPHEMERAL RECORDINGS. :
-----:

Washington, D.C.

Wednesday, May 5, 2010

The following pages constitute the
Motion to Adopt Partial Settlement in the
above-captioned matter at the Library of Congress,
Madison Building, 101 Independence Avenue, Southeast,
Washington, D.C., before Shari R. Broussard, RPR, CSR,
of Capital Reporting Company, a Notary Public in and
for the District of Columbia, beginning at
approximately 9:30 a.m. when were present on behalf of
the respective parties:

Capital Reporting Company
Motion to Adopt Partial Settlement 05-05-2010

2

1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

3 CHIEF JUDGE JAMES SLEDGE
JUDGE WILLIAM ROBERTS
4 JUDGE STANLEY C. WISNIEWSKI
Library of Congress
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101 Independence Avenue, Southeast
6 Washington, D.C. 20540

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Capital Reporting Company
Motion to Adopt Partial Settlement 05-05-2010

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1 A P P E A R A N C E S (Continued)

2 On behalf of College Broadcasters, Inc.:

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7 ALSO PRESENT:

8 Kyle Flynn
9 Colin Rushing
10 Michael Huppe
11 Suzanne Hand
12 Joel Willer
13 Wil Robedee

13 C O N T E N T S

14 ARGUMENT	PAGE
15 By Mr. Stoltz	5, 64, 82
16 By Mr. DeSanctis	22, 68
17 By Mr. Malone	51, 80

19 SOUNDEXCHANGE SETTLEMENT EXHIBIT: *	PAGE
20 Number 1	27

21 (*Exhibit retained.)

22

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1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Our hearing today in
3 the Webcasting III proceeding is to specifically
4 address the motion to adopt the partial settlement
5 made by SoundExchange and College Broadcasters, Inc.

6 Mr. Stoltz, are you going to begin?

7 MR. STOLTZ: Your Honor, we're prepared to
8 introduce testimony in support of our motion for
9 settlement.

10 I'm wondering if we could get a
11 clarification on the procedure for the hearing today
12 regarding the order of presentation.

13 CHIEF JUDGE SLEDGE: Yes. You're going
14 first. What you feel you need to present may be
15 nothing or it may be -- I think that's why you're the
16 lawyer.

17 MR. STOLTZ: Do Your Honors request
18 testimony? We have a witness prepared to testify.

19 CHIEF JUDGE SLEDGE: We do not request
20 testimony. We do not encourage anything. It would
21 only be if you feel it necessary.

22 MR. STOLTZ: Thank you, Your Honor.

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1 Your Honors, we, again, renew our motion for
2 the court to adopt the settlement between College
3 Broadcasters, Inc., and SoundExchange, and we would
4 like to reserve the right to rebut material introduced
5 by any objections at the time --

6 CHIEF JUDGE SLEDGE: On the motion?

7 MR. STOLTZ: -- as well.

8 CHIEF JUDGE SLEDGE: Let me ask a question
9 that jumps up at me in the agreement that is proposed.

10 In the beginning of your regulations you
11 include an election process.

12 MR. STOLTZ: Yes, Your Honor.

13 CHIEF JUDGE SLEDGE: How can there be an
14 election process to regulations adopted by the judges?

15 JUDGE ROBERTS: Mr. Stoltz, why don't you
16 come up to the podium so the reporter can hear a
17 little better.

18 MR. STOLTZ: Absolutely.

19 Your Honor, it was our understanding that a
20 noncommercial educational webcaster would have the
21 right to choose either the terms of the settlement
22 that we have moved the Board to adopt or any other set

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1 of rates and terms that might apply to them.

2 CHIEF JUDGE SLEDGE: I just don't understand
3 how you could have regulations that are binding and
4 have them permissive.

5 Do you know of any set of regulations that
6 allow a party to be bound by them or not, to elect to
7 be bound by them?

8 MR. STOLTZ: Well, my understanding in
9 general is that settlements adopted through the
10 Webcaster Settlement Act are voluntary on the part of
11 copyright users -- users of the license.

12 CHIEF JUDGE SLEDGE: You misstated
13 something. Settlements -- perhaps you didn't misstate
14 something.

15 Settlements entered under the Webcaster
16 Settlement Act are not adopted. They're settled.

17 MR. STOLTZ: That's correct.

18 CHIEF JUDGE SLEDGE: You are proposing
19 something different. You are proposing adoption as
20 regulations of a settlement that you have entered
21 under the Webcaster Settlement Act.

22 MR. STOLTZ: Yes, Your Honor, that's

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1 correct.

2 CHIEF JUDGE SLEDGE: So your statement is
3 partially true, and I see no problem with a settlement
4 reached under the Webcaster Settlement Act having an
5 election process. The question is how can regulations
6 that we adopt have an election process? How can
7 something be binding and be elective?

8 MR. STOLTZ: Again, my understanding of the
9 agreement that College Broadcasters reached with
10 SoundExchange was that once chosen, then it's binding
11 on -- once elected by a webcaster, a noncommercial
12 educational webcaster, the regulations would be
13 binding on both sides.

14 CHIEF JUDGE SLEDGE: No, sir, not would be
15 binding on both sides, would be binding on the world.
16 This agreement, if adopted, becomes law.

17 MR. STOLTZ: Yes, Your Honor.

18 CHIEF JUDGE SLEDGE: How can law be
19 elective?

20 MR. STOLTZ: I guess I don't see a
21 contradiction of that, Your Honor. The options
22 available are essentially the -- would be -- should

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1 this agreement be adopted as a regulation, the options
2 available would be either this set of regs and terms
3 or any other set, again, in the regulations to which a
4 particular webcaster applies, my understanding is it
5 wouldn't be mutually exclusive because the definition
6 of noncommercial educational webcaster is a subset of
7 the definition of noncommercial webcaster.

8 JUDGE WISNIEWSKI: Are you suggesting that
9 if someone didn't opt into this, they would no longer
10 be considered a noncommercial educational webcaster
11 but simply some other type of noncommercial webcaster?

12 MR. STOLTZ: Yes. Yes, Your Honor.

13 JUDGE ROBERTS: I have to say, Mr. Stoltz,
14 that I share the confusion over this motion that the
15 other judges do.

16 If you reach this agreement under the
17 Webcaster Settlement Act and the Copyright Office
18 published it per the terms of the Webcaster Settlement
19 Act, what more do you need? Why do you need any
20 action from us? That's what's got me scratching my
21 head and I think everyone up here scratching their
22 heads.

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1 MR. STOLTZ: I understand, Your Honor. It
2 was our intent and, my understanding, also
3 SoundExchange's intent that this set of rates and
4 terms be available as precedent in future proceedings
5 and it was for primarily that reason that we asked the
6 Board to adopt this set of rates and terms as
7 regulations.

8 CHIEF JUDGE SLEDGE: So you got Congress to
9 say that it's not precedential and now you're acting
10 here to make it precedential?

11 MR. STOLTZ: In this particular instance,
12 yes.

13 CHIEF JUDGE SLEDGE: I'm sorry, Judge
14 Roberts.

15 JUDGE ROBERTS: That's all right.

16 I'm looking at your proposed regulation and
17 let's take Part 380, "Rates and terms for
18 noncommercial educational webcasters." It doesn't say
19 rates and terms for certain noncommercial educational
20 webcasters or rates and terms for noneducational
21 webcasters affiliated with the college broadcasters.
22 It says the entire category, "noncommercial

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1 educational webcasters." But I hear you to say now
2 that if we were to adopt it, which you proposed, it
3 would only be certain noncommercial educational
4 webcasters and then presumably -- not presumably -- we
5 would have to set rates for all other noncommercial
6 educational webcasters however they are defined?

7 MR. STOLTZ: No, Your Honor, we do intend
8 these regulations be available to all noncommercial
9 educational webcasters as defined.

10 JUDGE ROBERTS: On an election basis you've
11 said.

12 MR. STOLTZ: On a default basis, Your Honor.

13 JUDGE ROBERTS: On a default basis.

14 So if a noncommercial educational webcaster
15 opted, according to what you've proposed, not to
16 follow those regulations -- again, we have issues
17 about how we can adopt regulations that are
18 elective -- but someone elects not to follow these,
19 what do they then follow? They just simply don't pay
20 SoundExchange?

21 MR. STOLTZ: No, Your Honor. My
22 understanding is they'd follow the -- either any of

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1 the entered rates and terms under the Webcaster
2 Settlement Act that would apply to that entity or to
3 --

4 JUDGE ROBERTS: Are there any others? I'm
5 not aware of any others other than the agreement that
6 you have for noncommercial educational broadcasters --
7 webcasters.

8 MR. STOLTZ: The NAB settlement, Your Honor.

9 JUDGE ROBERTS: Okay. So you're saying that
10 you have a choice. If you are a noncommercial
11 educational webcaster, you can choose between either
12 what has been proposed through the NAB agreement or
13 this one?

14 MR. STOLTZ: Some of them can, Your Honor,
15 yes.

16 JUDGE ROBERTS: Some of them can. Okay.
17 Does that mean all of them can or am I still
18 missing -- because there's still going to be people --
19 if we adopted the NAB agreement and your agreement,
20 are there still going to be noncommercial educational
21 webcasters that are not covered?

22 MR. STOLTZ: No, Your Honor. It's my

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1 understanding that any noncommercial educational
2 webcaster would be covered.

3 JUDGE ROBERTS: Okay. Well, you guys did
4 not do a very good job in making this clear, that
5 between these two agreements all noncommercial
6 educational webcasters would be covered, that this
7 would apply to certain ones -- again, I don't see that
8 word or any subcategorization of that -- and that
9 certain others the terms of the NAB agreement could
10 apply. I just don't see that if we adopt these two as
11 is. And I agree with Judge Sledge that adopting a
12 regulation that is somehow elective and not specifying
13 what the alternative is would not be appropriate to
14 do.

15 MR. STOLTZ: I understand, Your Honor. I
16 apologize for the confusion.

17 Again, it was -- it was our intent that this
18 be a default set of rates and terms for noncommercial
19 educational webcasters.

20 JUDGE WISNIEWSKI: Mr. Stoltz, I don't
21 understand your use of the word "default."

22 Default means that you don't take any action

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1 and, therefore, you're covered.

2 That's not what your proposal suggests. You
3 have to take action to be covered by your proposed
4 settlement; isn't that correct? You have to elect in?

5 MR. STOLTZ: My understanding is that you do
6 not, Your Honor, have to elect in.

7 JUDGE WISNIEWSKI: Isn't that what it says
8 in the regs here that you've submitted?

9 CHIEF JUDGE SLEDGE: 380.1, Subsection B?

10 JUDGE WISNIEWSKI: That's precisely the
11 point that Chief Judge Sledge started this discussion
12 out with.

13 MR. STOLTZ: Your Honors, the proposal says,
14 "Noncommercial educational webcasters shall comply
15 with the requirements of Sections 112(b) and 114, the
16 rates and terms of this part," meaning the proposed
17 regulation, "however" -- that establishes the default.
18 It goes on to say, "However, if a noncommercial
19 educational webcaster is also eligible for any other
20 rates and terms, it may by written notice to the
21 collective elect to be subject to such other rates and
22 terms."

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1 JUDGE WISNIEWSKI: So you're suggesting it's
2 an opt-out provision rather than an opt-in provision?

3 MR. STOLTZ: Yes, Your Honor.

4 JUDGE WISNIEWSKI: I also don't quite
5 understand your reference to the NAB agreement.

6 What provision in the NAB agreement covers
7 noncommercial broadcasters?

8 MR. STOLTZ: To be honest, I'm not sure,
9 Your Honor.

10 JUDGE WISNIEWSKI: It having been submitted
11 as a settlement for commercial broadcasters, I wonder
12 about that issue. Perhaps someone can clarify.

13 JUDGE ROBERTS: Say, Mr. Stoltz, I'm looking
14 at that agreement, at 380.2 of the NAB agreement, and
15 I don't even see a definition of noncommercial
16 broadcasters.

17 MR. STOLTZ: My understanding is that a
18 broadcaster operated by a nonprofit entity would not
19 be precluded in some cases from using the NAB
20 agreement.

21 JUDGE ROBERTS: How would anyone know that?

22 If I was a small, uninformed noncommercial

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1 broadcaster that was webcasting and I look at this NAB
2 agreement here -- again, which is asked to be adopted
3 as our regulations -- I don't see anything even in the
4 definitional provision that refers to the
5 noncommercial. I would think that well, this doesn't
6 apply to me. But I hear you to say it might apply.

7 MR. STOLTZ: That was my understanding, Your
8 Honor.

9 JUDGE ROBERTS: Well, it may be your
10 understanding, but I wish you would point and explain
11 to us so that it would be our understanding because I
12 just don't see the language there.

13 CHIEF JUDGE SLEDGE: So I think I understand
14 your answer to be that if we adopt this agreement,
15 then it would bind all noncommercial educational
16 webcasters unless they submit a notice prepared by
17 SoundExchange to SoundExchange that provides that they
18 are electing to be operating under another set of the
19 regulations for the statutory license, and I think
20 you're presuming that that notice would have a way to
21 identify which other provision of the regulations of
22 the statutory license they say will apply to them.

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1 MR. STOLTZ: Yes, Your Honor.

2 CHIEF JUDGE SLEDGE: And if SoundExchange
3 didn't agree with what they've said on the notice,
4 they would always have the option to consider that
5 they are infringing and not operating under the terms
6 of the statutory license?

7 MR. STOLTZ: Yes, Your Honor, that's my
8 understanding.

9 CHIEF JUDGE SLEDGE: And then the objection
10 that's been raised by Intercollegiate Broadcaster
11 System you would answer that all they have to do is
12 file the notice with SoundExchange, not be bound by
13 this agreement, and they would be free to exercise the
14 statutory license assuming there is another set of
15 regulations under the license that apply to them?

16 MR. STOLTZ: To be honest, Your Honor, we
17 never have been clear on precisely what the objection
18 of Intercollegiate Broadcasting System is.

19 The only notice of an objection that we've
20 received were in the comments that IBS submitted on
21 April 22nd in response to the Federal Register
22 publication of April 1st. And my understanding of

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1 those comments was that they objected to the entry of
2 the settlement as a regulation potentially earlier
3 than the conclusion of the Webcasting III proceeding,
4 and it's not clear to us what the -- what the import
5 of that objection is. And that's the only notice we
6 received of an objection.

7 JUDGE ROBERTS: Well, assuming that IBS
8 doesn't want to be bound or isn't interested in
9 electing the proposal that you have made, I still
10 didn't hear you answer Judge Sledge's question, which
11 is what's left for them then? What is their choice if
12 they choose not to opt in or opt out, whichever term
13 you wish to use, into the CBI agreement? What is
14 their choice then?

15 MR. STOLTZ: Well, my understanding is
16 potentially none, Your Honor. It's depending on an
17 individual station's eligibility for the NAB agreement
18 or any other agreement that should be -- that may be
19 entered under the potential settlement agreement, but
20 --

21 JUDGE ROBERTS: So in your view, then, IBS
22 is stuck with this? If we adopt this, this is the

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1 only option that they're going to have because this is
2 the only terms and provisions that their stations are
3 going to be able to satisfy? I presume you're also
4 telling me that they're not going to meet the terms of
5 the NAB.

6 MR. STOLTZ: I don't -- I don't know that
7 for sure, Your Honor. I suspect it varies by station.
8 But, yes, in the absence of some other eligible set of
9 rates and terms, we are asking for these regulations
10 to be binding on all noncommercial educational
11 webcasters.

12 JUDGE ROBERTS: Okay. You just spoke the
13 magic words there in the last sentence that I thought
14 when I read this initially that's what you were trying
15 to do and you indicated that no, that was not -- not
16 indicated -- said that's what you weren't trying to
17 do, that there was opt in/opt out if we jump over to
18 the NAB agreement, but with respect to noncommercial
19 educational broadcasters, for the most part they would
20 be bound, all of them would be bound by what you're
21 proposing here today?

22 MR. STOLTZ: Yes, Your Honor.

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1 JUDGE ROBERTS: All right.

2 CHIEF JUDGE SLEDGE: What Judge Roberts just
3 said, it sounds to me like you exactly contradicted
4 yourself.

5 If your goal is to bind all noncommercial
6 educational webcasters, then why did you engage in
7 that long discussion about that this is a default and
8 they have the ability to opt out simply by filing a
9 notice with SoundExchange?

10 MR. STOLTZ: Well, forgive me if I spoke
11 imprecisely, Your Honor, but the -- what we're asking
12 for, as Judge Wisniewski said, opt out, but that opt
13 out is -- would be binding in the absence of any
14 election of any other applicable settlement.

15 JUDGE ROBERTS: But there's nothing to opt
16 out to unless you happen to be an educational
17 broadcaster that somehow could meet the terms of the
18 NAB agreement, which presumably not very many would be
19 able to do. Then there's nothing to opt out to.
20 You're stuck with these rates here that CBI is
21 proposing.

22 MR. STOLTZ: In that case, yes, Your Honor.

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1 Yes, such a webcaster would be stuck with these rates.

2 CHIEF JUDGE SLEDGE: With this change of
3 direction, I'll ask you to answer again my first
4 question.

5 Now that we can discount all the discussion
6 about opt out and default, how can we adopt
7 regulations that are binding on the world and be
8 elective?

9 MR. STOLTZ: Your Honor, they are elective
10 in the sense that any statutory license is elective.
11 Assuming that one is complying with a statutory
12 license for which one is eligible and has no other
13 statutory license available to them, then in that
14 sense they would be binding.

15 CHIEF JUDGE SLEDGE: Go ahead. You just
16 said there is no other statutory license available to
17 them.

18 MR. STOLTZ: I can't say that with complete
19 certainty, Your Honor, but my understanding is for
20 some there will not be.

21 JUDGE ROBERTS: I can. There is no other
22 statutory license for webcasting other than 114.

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1 There can be private licenses or simply a webcaster
2 can choose not to pay anybody and be a copyright
3 infringer, but in terms of the statutory license this
4 is the only one.

5 MR. STOLTZ: Yes, Your Honor, but under 114
6 and under the Webcaster Settlement Act there are
7 different sets of rates and terms.

8 JUDGE ROBERTS: There are different sets of
9 rates and terms, yes, but applicable all to the same
10 license. That was the question. Is there -- and you
11 were saying well, there may be other statutory
12 licenses. There's only one statutory license.

13 I know some people like to refer to them as
14 multiple statutory licenses simply because they apply
15 to different categories of operators, but I think the
16 better point of view of that is that there is one
17 license in Section 114 under which a number of
18 different people operate. Just as with Section 111,
19 there's one license for cable operators, but a lot of
20 cable operators -- there's big ones, small ones, ones
21 that look different, wireless ones, wired ones, but
22 they all fit under the umbrella of the one license.

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1 So there is no other statutory license. So
2 it's this one and the regulations that we put forth or
3 a private agreement or an agreement under the
4 Webcaster Settlement Act. Those are the only options.

5 MR. STOLTZ: Yes, that's correct, Your
6 Honor, and I apologize if I spoke imprecisely before.
7 And given that definition and the text of our
8 proposal, we don't believe that it's elective.

9 JUDGE ROBERTS: Well, of course this is not
10 your agreement alone, so we'll hear what SoundExchange
11 at some point here has to say about it, but I think
12 you need to take a look at the language that you have
13 proposed to us in light of today's discussion and
14 rethink your position. Maybe SoundExchange has
15 additional comments, I don't know. But I think I
16 understand now what you're saying.

17 MR. STOLTZ: Thank you, Your Honor.

18 CHIEF JUDGE SLEDGE: Any other questions?

19 Thank you.

20 Mr. DeSanctis?

21 MR. DeSANCTIS: Thank you, Your Honor.

22 Your Honors, if I may start by addressing

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1 some of the questions that you've raised this morning
2 on SoundExchange's motion for adoption of the
3 settlement.

4 With respect to the CBI settlement -- I
5 apologize. It is the intent of the parties,
6 SoundExchange and both CBI, that the agreement, if
7 adopted as regulations, would apply to other
8 noncommercial educational webcasters that are members
9 of IBS.

10 Our reading of the statute is that once
11 parties have reached a settlement, that settlement can
12 be proposed almost as akin to a summary judgment
13 procedure. That settlement can be proposed early on
14 in the case, which is when SoundExchange did it, in
15 order to settle the case and avoid litigation. So if
16 it is adopted industry wide as regulations for
17 noncommercial educational webcasters, it would apply
18 to non-CBI members such as members of IBS.

19 JUDGE ROBERTS: Why didn't you say that in
20 your motion?

21 CHIEF JUDGE SLEDGE: In the agreement.

22 JUDGE ROBERTS: In the motion or in the

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1 agreement.

2 MR. DeSANCTIS: Well, we did say it
3 essentially in the agreement where noneducational --
4 I'm sorry -- noncommercial educational webcasters are
5 defined. It's not limited to CBI and its members.
6 It's --

7 JUDGE ROBERTS: That's right.

8 MR. DeSANCTIS: Right, and that was very
9 intentional and that was not -- that was by design.
10 That wasn't something that we stumbled into or meant
11 to hide in any way.

12 JUDGE ROBERTS: Right, it was intended to
13 apply to noncommercial educational webcasters just as
14 you have titled your Exhibit A, Part 380, right?

15 MR. DeSANCTIS: Yes, absolutely.

16 JUDGE ROBERTS: Then why is there language
17 in there about electing in or electing out?

18 MR. DeSANCTIS: Well, the electing in and
19 the electing out -- first let me let me say that the
20 NAB deal is not open to noncommercial webcasters.
21 That's actually in the NAB deal itself. That's at
22 380.11(4), defines a broadcaster as not a commercial

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1 webcaster.

2 JUDGE ROBERTS: Okay.

3 MR. DeSANCTIS: In turn, I think the opt-out
4 provision in 380.2 was really meant to function much
5 like --

6 JUDGE ROBERTS: Would you say that section
7 again, by the way, with respect to the NAB agreement?

8 MR. DeSANCTIS: Sure. I'm looking at the
9 Federal Register version as published by the Copyright
10 Office and I'm looking at Section 380.11 is the
11 definitions.

12 JUDGE ROBERTS: Okay.

13 MR. DeSANCTIS: The second definition is
14 broadcaster and --

15 JUDGE ROBERTS: So that's not part of what
16 you have submitted here because what you've submitted
17 for the joint motion to adopt partial settlement for
18 NAB only goes up to 380.8.

19 CHIEF JUDGE SLEDGE: I thought I was
20 addressing the NAB and not this.

21 MR. DeSANCTIS: Yes.

22 JUDGE ROBERTS: The NAB agreement only goes

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1 up to 380.8 in what you've asked us to adopt.

2 CHIEF JUDGE SLEDGE: No, this is the CBI
3 agreement.

4 JUDGE ROBERTS: It is referring to the CBI
5 or NAB?

6 MR. DeSANCTIS: Your Honor, I think there
7 might be a mix-up.

8 You're looking at what we submitted --

9 JUDGE ROBERTS: Yes.

10 MR. DeSANCTIS: -- and when it was published
11 in the Federal Register, the provisions got
12 renumbered.

13 JUDGE ROBERTS: Okay.

14 MR. DeSANCTIS: Sorry if you and I weren't
15 on the same page.

16 CHIEF JUDGE SLEDGE: Oh.

17 MR. DeSANCTIS: I'm reading from the Federal
18 Register publication, which I figured was sort of the
19 official version at this point.

20 JUDGE ROBERTS: Can you tell me then, since
21 I don't have that in front of me, what section that
22 would be of what you proposed? Is it the definitions

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1 part?

2 MR. DeSANCTIS: It's in the definitions.

3 JUDGE ROBERTS: Okay.

4 CHIEF JUDGE SLEDGE: Are you going to give
5 us the Federal Register first? Is that what you have?

6 MR. DeSANCTIS: I do have the Federal
7 Register version here.

8 CHIEF JUDGE SLEDGE: Go ahead and --

9 MR. DeSANCTIS: Sure.

10 We've marked this as SoundExchange
11 Settlement Hearing Exhibit 1 so we can identify it.

12 JUDGE ROBERTS: Thank you.

13 (SoundExchange Exhibit Number 1 was
14 marked for identification.)

15 MR. DeSANCTIS: So where I was reading, just
16 to go back to closing the loop on whether
17 noncommercial educational webcasters, not the NAB
18 deal, I think the answer there is no per what's been
19 numbered in the Federal Register as 380.11(4).

20 Broadcasters are defined, among other
21 things, as not a noncommercial webcaster under the
22 definition of 114(f).

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1 JUDGE ROBERTS: Fair enough.

2 MR. DeSANCTIS: The parties certainly saw
3 the provision -- going back to 380.2 of subpart C in
4 the CBI deal, the opt-out provision that we've been
5 discussing. The parties certainly saw that as an
6 analogy to the -- what we thought was the very
7 uncontroversial proposition that even when there are
8 statutory rates parties can have their own private
9 agreements.

10 JUDGE ROBERTS: That's always been the case
11 --

12 MR. DeSANCTIS: Which has always been the
13 case.

14 JUDGE ROBERTS: -- under any license.

15 MR. DeSANCTIS: That's right.

16 So the intent of this provision was that the
17 deal -- the deal, if adopted as rates for the noncom
18 educational sector of the industry, would apply to
19 everyone who meets the definition of noncom
20 educational webcaster, which is also included at
21 380.2(1), which is the definitions section for the NAB
22 -- I'm sorry, the definitions section for the CBI

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1 deal. In that section noncommercial educational
2 webcaster is defined.

3 So the thinking was anyone who met that
4 definition would be subject to these rates if adopted
5 as rates and terms for that sector of the industry.

6 What's been referred to today as an opt-out
7 provision would allow a webcaster to do is either to
8 have a private deal, or at the time that this was
9 submitted and still today we don't know, and we
10 certainly don't want to prejudge, whether the Web III
11 proceeding is going to include rates for noncommercial
12 webcasters. We have noncommercial educational
13 webcasters.

14 In our proposal we have proposed to exclude
15 them from the Web III proceeding and they would be
16 governed here. But we don't know that that's going to
17 happen, and so the Web III proceeding might have some
18 rates or terms that are applicable by its terms to
19 potentially some noneducational -- noncommercial
20 educational webcasters.

21 In addition, there are noncommercial deals
22 that have been published in the Federal Register that

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1 various stations actually might be able to opt into if
2 they meet their terms. I'm thinking of religious
3 broadcasters and some others. So there you would have
4 a situation where a webcaster actually meets the
5 definitions of two regulatory regimes.

6 Now I think we're in a situation where it's
7 not opt in and creating the sort of legal confusion in
8 that regard, but now you have a webcaster who either
9 has their own deal, which you want to encourage people
10 to do, or actually meets the definitions of two
11 regulatory regimes based on the sort of unique hybrid
12 nature of many college radio stations.

13 In that case what this offers is it offers
14 the station the option to essentially opt out of this
15 and opt into whichever one applies, which, of course,
16 would apply to them by its terms anyway. So it's
17 really not -- it's not really opt in or opt out. It's
18 allowing the webcaster to elect which scheme it's
19 going to be subject to if it happens to be subject to
20 two or more.

21 JUDGE ROBERTS: All the options that you
22 describe, with, of course, the exception of those with

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1 respect to the Webcaster Settlement Act because we
2 haven't had that type of legislation regarding another
3 statutory license, but in terms of private agreements
4 and other arrangements, those are all possible and
5 occur under other statutory licenses. So you're
6 asking us to adopt regulations with this election
7 provision where no other statutory license and its
8 terms talks about electing in or electing out to some
9 other agreement that is not part of what is published
10 in the Code of Federal Regulations.

11 Why did you think that was a good thing to
12 do when no other set of regulations that we have
13 provides for that?

14 Certainly take, for instance, with 115 you
15 could have set the rate that songwriters were to
16 receive, but we could have put in unless, of course,
17 they have a private agreement with the record company,
18 and then that's the per play rate that they get or the
19 percentage or whatever they have. We didn't do that,
20 nobody asked us to do that, it's never been done that
21 way. Why is it necessary to do that now?

22 MR. DeSANCTIS: Sure. I think -- a couple

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1 of things. First of all, I think the standard that
2 we're looking at here being, given particularly that
3 no party or no nonparty objected to this provision, I
4 think what we're asking now is not whether it's a
5 reasonable basis for setting rates but whether it's
6 unlawful, which is, of course, where Your Honor
7 started this discussion with respect to this
8 provision. And though it may be true that this type
9 of provision -- first of all, I think this type of
10 provision does appear in the statute itself with
11 respect to private agreements. I think the statute
12 has always encouraged private agreements that would
13 actually trump regulatory provisions issued as part of
14 regulation. So I think there is precedent for it in
15 the private deal context.

16 In the context where an entity may be
17 subject to two different regulatory schemes I don't
18 think the fact -- first of all, I don't know for sure,
19 but I trust, Your Honor, that that doesn't exist in
20 any other section. I can't imagine. I can't promise
21 I looked everywhere, but I trust Your Honor. And if
22 that's the case, then I think that doesn't make it

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1 unlawful. It makes it unprecedented. But I don't
2 think there's anything in the statute or in the --
3 well, let's just say the statute -- that would
4 preclude it, and I think that's the standard that we
5 should be looking at; is there something in the
6 statute or obviously in the Constitution that
7 precludes it and renders something unlawful. And I
8 don't think that exists here.

9 This was a -- what the parties thought was,
10 you know, hopefully a practical solution to situations
11 that actually may cause greater confusion in the
12 future if you didn't have a provision like this, where
13 someone might be subject to two different deals.

14 JUDGE WISNIEWSKI: Mr. DeSanctis, you were
15 trying to give some example of that and, frankly, I
16 don't think you gave any example of that.

17 You talked about the religious broadcasters,
18 but you never took it to its conclusion to say what
19 regulatory scheme of noncommercial religious
20 broadcasters would be subject to that would be other
21 than this particular one.

22 MR. DeSANCTIS: Well, I think a non -- a

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1 noncommercial religious broadcaster would not
2 necessarily be subject to this regime, which is
3 defined --

4 JUDGE WISNIEWSKI: Precisely. So can you
5 give us an example? You keep talking about the
6 potential.

7 MR. DeSANCTIS: Yeah.

8 JUDGE WISNIEWSKI: And I'd like an example,
9 a real example of where some webcaster would be
10 subject to two schemes.

11 MR. DeSANCTIS: Well, I think it's the other
12 way around. It's not whether other webcasters would
13 be subject to the noncommercial educational structure
14 that's being proposed today. It's whether
15 noneducational commercial webcasters that are subject
16 to the definition in 380.2(1) would be subject to some
17 other scheme.

18 JUDGE WISNIEWSKI: I understand that.
19 That's precisely the question I'm asking you.

20 MR. DeSANCTIS: I just wanted to make sure
21 I --

22 JUDGE WISNIEWSKI: Give me an example of

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1 what other scheme they possibly could be subject to
2 presently.

3 MR. DeSANCTIS: I think -- okay. By
4 "presently" I'm presuming you're saying let's not
5 leave open what may or may not happen in the Web III
6 proceeding and I --

7 JUDGE WISNIEWSKI: Well, the only way this
8 seems to happen is if we adopt this settlement and we
9 adopt your proposal for noncommercial webcasters. So
10 other than your proposal, I don't see where there's a
11 basis for what you're saying.

12 MR. DeSANCTIS: Well, I think I know the
13 answer, but I don't want to misspeak. If I could just
14 confer with one of my colleagues for just a second.

15 (Brief pause.)

16 MR. DeSANCTIS: Sorry. I appreciate the
17 indulgence.

18 CHIEF JUDGE SLEDGE: Sure.

19 MR. DeSANCTIS: In the Federal Register,
20 Your Honor, Volume 74, Number 154, page 40624 dated
21 August 12, 2009, a WSA deal with noncommercial
22 religious broadcasters is published there.

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1 The definition of who it applies to is
2 noncommercial webcasters generally, and it has a
3 definition that's there in the Federal Register. And
4 I think it's not only possible but probable that many
5 noncommercial educational webcasters would also meet
6 the definition of noncommercial webcasters for
7 purposes of that deal, which means that --

8 JUDGE WISNIEWSKI: That deal isn't under our
9 regulation, is it?

10 MR. DeSANCTIS: It's under the WSA.

11 JUDGE WISNIEWSKI: So --

12 CHIEF JUDGE SLEDGE: Which is not the
13 regulations.

14 JUDGE ROBERTS: Are you suggesting,
15 Mr. DeSanctis, because it got published in the Federal
16 Register, that makes it a regulation or makes it
17 regulatory is the word you've been using?

18 MR. DeSANCTIS: No, of course it's not.
19 It's just agreed to by the parties. It's something
20 that additional parties can opt into, but it is not a
21 creature of a regulation, obviously which is only
22 something Your Honors can publish or adopt.

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1 CHIEF JUDGE SLEDGE: It's not binding on the
2 world? It's not law?

3 MR. DeSANCTIS: That's right. It's
4 available to be opted into. It's not binding on
5 anyone the way something would be if it were adopted
6 by this Court. And so -- but it is something that
7 parties can still opt into. And in terms of
8 regulation set by this Court, the answer there I think
9 would be the results of the Web III proceeding if
10 SoundExchange's proposal to carve out noncommercial
11 webcasters is not adopted.

12 JUDGE WISNIEWSKI: Well, again, that's
13 prospective, as I've said.

14 I'm asking you for an example of when a
15 noncommercial webcaster was defined under the
16 regulations as having two different schemes available
17 to that noncommercial webcaster. As far as I know,
18 that's never occurred, has it?

19 MR. DeSANCTIS: And I'm...

20 JUDGE WISNIEWSKI: Isn't the whole idea of
21 the statutory scheme to provide information to the
22 users so that they don't have any confusion such as

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1 might arise from such a situation?

2 MR. DeSANCTIS: It is, and if I -- if I -- I
3 don't even want to say if. I apparently did not
4 answer your question and I'm sorry about that. I
5 think I was interpreting it a little bit more broadly
6 than you had asked it.

7 There is the concern about Web III. There
8 are other sets of terms, maybe is a better phrase to
9 use, that are available to webcasters from WSA deals
10 that noncommercial educational webcasters would be
11 able to opt into whose terms they would meet and
12 satisfy.

13 But, no, in terms of an existing set of
14 regulations that exist today, if this were adopted, I
15 don't think there would be another set of regulatory
16 terms unless it comes out in Web III.

17 CHIEF JUDGE SLEDGE: So what I understand,
18 then, is rather than an opt-in or opt-out or a
19 default, the operation of 380.1(b), "Election," is
20 simply a notice to SoundExchange that we are operating
21 that -- we, webcaster, are operating under the
22 statutory license, these are the regulations that we

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1 believe we are operating under, and then if
2 SoundExchange believes that they are incorrect, then
3 their option would be to allege that they're an
4 infringer?

5 MR. DeSANCTIS: I think that's right. I
6 think that's right. It's not really opt in or opt
7 out. I think the way Your Honor put it is right.
8 These regulations are the regulations that would
9 apply. But any webcaster can put SoundExchange on
10 notice that they actually qualify for some other set
11 of terms that exist in the world and if SoundExchange
12 disagrees, then the entity would be an infringer.

13 CHIEF JUDGE SLEDGE: And all you're asking
14 from us in this proposed regulation is for authority
15 to require webcasters to give you such a notice?

16 MR. DeSANCTIS: I think that's right. So
17 that SoundExchange knows what's happening and why
18 they're getting the amounts of money they may be
19 getting or, you know, the reporting requirements they
20 may be getting, that's right. But I think it would
21 be -- even without this provision, I think small
22 webcasters could do that, right.

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1 I think what this adds is the notice to
2 SoundExchange so that SoundExchange can know what's
3 going on and doesn't have to, you know, spend money
4 out of their, you know, enforcements or trying to
5 figure out what's going on. This just provides a very
6 clear procedure from the outset.

7 CHIEF JUDGE SLEDGE: And if this agreement
8 is adopted, then CBI would not continue in the
9 Webcasting III proceeding, it would not be making any
10 proposed rates or terms in the Webcasting III
11 proceeding, and the only proposed rates and terms in
12 Webcasting III would be submitted by IBS and
13 SoundExchange, and the regulations that are adopted in
14 Webcasting III, then, would be the regulations that
15 apply to anyone who did not exercise the statutory
16 opportunity to elect into a WSA agreement?

17 MR. DeSANCTIS: I think that's right, Your
18 Honor, with the possible exception that I think if
19 this settlement were adopted by the Court, then IBS
20 would not necessarily be putting on a case either.

21 In other words, this would act as an
22 industry-wide settlement for the noncommercial

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1 educational webcasters the way I believe Section 801
2 is intended to operate.

3 CHIEF JUDGE SLEDGE: Doesn't that conflict
4 with what you just told Judge Wisniewski, that you
5 expected the answer of an example that he asked you
6 for situations when two regulations applied to one
7 noncommercial educational webcasters, your answer was
8 any potential regulations that come out of Webcasting
9 III.

10 MR. DeSANCTIS: That's right, with respect
11 to regulations from the Court, yes. And the reason we
12 don't know whether that would happen is because we
13 have proposed in our rate proposal to carve out
14 educational noncommercial webcasters in the hope that
15 they would be subject to these regulations that are
16 before the court today, but we just --

17 CHIEF JUDGE SLEDGE: Well, why can't you put
18 those two together?

19 MR. DeSANCTIS: We just don't know. We just
20 don't know if that's going to happen.

21 CHIEF JUDGE SLEDGE: Help me understand how
22 I can put those two statements, two positions

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1 together.

2 If your example of when a notice may be
3 given under 380.1(b) is when two regulations apply to
4 one entity, one station, then they are giving notice
5 as to which regulation they seek to operate under, and
6 when asked when can that arise, the answer given was
7 if there are regulations that come out of Webcasting
8 III, then they would be regulations, and that if this
9 agreement is adopted, then those would be regulations
10 and the party might be subject to two different sets
11 of regulations.

12 How does that fit with your statement that,
13 if this agreement is adopted, that it would be
14 industry wide and would apply to IBS members and
15 anyone else that operates as a noncommercial
16 educational webcaster?

17 MR. DeSANCTIS: Right. If our, and I do
18 want to answer your question precisely. If our -- if
19 the carve-out that SoundExchange is proposing in its
20 rate proposal is adopted by the Court, is accepted by
21 the Court, then the noncommercial educational
22 webcasters would be carved out of any regulations

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1 coming out of the Web III proceeding. And if that's
2 the case, then we don't need this sentence. This
3 sentence can be excised if we're just looking at
4 statutory regulatory schemes, you know, issued by the
5 Court.

6 But if that carve-out of ours is not adopted
7 by the Court, and, of course, we don't know what the
8 Court will do, then any number of terms and
9 definitions might apply to noncommercial webcasters
10 and sweep in noncommercial educational webcasters.
11 And in that event what this sentence would do in
12 Section 380.2 is allow a noncommercial educational
13 webcaster who may meet both the definitions then
14 qualify under the definition of both statutory
15 structures to choose one or the other.

16 Certainly I hope that clarifies, but if I
17 was unsuccessful, please let me know.

18 CHIEF JUDGE SLEDGE: It still sounds very
19 much to me like the first question that Judge Roberts
20 asked you, that why do you need this to be adopted,
21 and your answer is what you're trying to do is keep us
22 from adopting in Webcasting III any regulations other

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1 than the ones you have proposed.

2 As you said, if we adopt the proposed
3 regulations in Webcasting III, then this is
4 unnecessary because your proposal carves out
5 noncommercial educational webcasters?

6 MR. DeSANCTIS: That's right.

7 CHIEF JUDGE SLEDGE: And if we adopt this
8 agreement, then you say it will be binding industry
9 wide and would prevent us from adopting any
10 regulations in Webcasting III other than what you've
11 proposed?

12 MR. DeSANCTIS: I never agreed with the
13 proposition that you can adopt things other than what
14 we proposed, but I think you can adopt things other
15 than what we proposed even if this were adopted. So
16 if this 380.2 were adopted or -- I'm sorry -- if the
17 whole CBI deal were adopted as regulations for that
18 limited sector of the industry, we certainly would be
19 advocating that it would make sense to, you know, very
20 specifically carve noncommercial educational
21 webcasters out of the resulting Web III regulations,
22 but Your Honors presumably may not. And, you know, at

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1 the time that this was written I believe it was
2 unclear whether there would be noncommercial
3 webcasters litigating in the Web III case and there
4 was a lot of uncertainty as to where that might go.

5 As it turns out, obviously we only have Live
6 and noncommercial educational webcasters are
7 litigating in the case, which may make that carve-out
8 make more sense. But at the time this was written we
9 didn't know what noncommercial webcasters might be
10 participating in the case, so we didn't know where
11 that would go.

12 If this is adopted, the CBI deal is adopted
13 as regulations, it would be our position that
14 certainly that would make the carve-out in our rate
15 proposal make a heck of a lot of sense, but, of
16 course, there may be countervailing interest and we
17 certainly don't want to prejudge what Your Honors may
18 do there.

19 JUDGE ROBERTS: Mr. DeSanctis, to cut to
20 your purpose here, if in Webcaster III we decide to
21 accept some form of the rates and terms proposed by
22 IBS for noncommercial educational broadcasters, then

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1 you really need this language, don't you, because now
2 there would be potentially two regulatory schemes;
3 some that may want to have the IBS, whatever we set
4 for them, or set for the class based on the evidence
5 that they presented, and then you would have yours
6 that CBI had agreed to. So you would really need,
7 then, to have this and have language that talks about
8 election because it would be another set of
9 regulations, correct?

10 MR. DeSANCTIS: I don't think so. At least
11 that's not the way that -- I sort of envision it
12 rolling out maybe the other way around.

13 JUDGE ROBERTS: Okay. That's fine.

14 Now, if we don't accept IBS' proposal and we
15 adopt your proposal in your direct case, which is for
16 essentially this agreement, the carve-out for this,
17 then you don't need this language about elective in
18 the agreement because you got it, your agreement goes
19 into the Federal Register and it goes into the Code of
20 Federal Regulations, and that is now binding on all
21 noncommercial educational broadcasters.

22 MR. DeSANCTIS: Right.

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1 JUDGE ROBERTS: So we don't need to talk
2 about elections or anything like that at that point in
3 time, right?

4 MR. DeSANCTIS: I believe that's right, and
5 that's probably articulated better than what I tried
6 to answer Judge Sledge's question a moment ago. That
7 if our rate proposal in Web III is adopted, this is
8 not necessary. The sentence at 380.2 that we've been
9 discussing would not be necessary because
10 noncommercial educational webcasters would be carved
11 out of those regulations and it's -- you know, looking
12 at it that way, this really isn't necessary to this
13 deal at all. It's there to avoid confusion in the
14 event that there are overlapping statutory rate terms,
15 which at the time this was submitted we certainly
16 thought there could be.

17 JUDGE ROBERTS: So adopting your proposal
18 before we came out with Webcaster III would probably
19 just confuse things, wouldn't it?

20 MR. DeSANCTIS: No, I don't think it would.

21 JUDGE ROBERTS: Or potentially require an
22 amendment once Webcaster III came out depending upon

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1 how we came out with it?

2 MR. DeSANCTIS: Depending upon what happens
3 in Webcaster III. But I don't think it would be
4 confusion until that time because this would be the
5 regulatory scheme applicable to noncommercial
6 educational webcasters. There wouldn't be anything --
7 of course this starts in 2011, so there's no current
8 confusion, and I think the schedule for Web III is
9 before that. So I don't think there should be any
10 confusion in reality.

11 JUDGE ROBERTS: But there's nothing really
12 to gain, is there, by rushing out to get this
13 published, is it, and adopted?

14 MR. DeSANCTIS: Well, I think one thing it
15 does and one thing that SoundExchange was intending,
16 and I don't know if we've -- maybe we didn't make this
17 sufficiently clear in the motion. It's certainly been
18 SoundExchange's position that settlements like this
19 that arise during the course of a proceeding before
20 this Court can be proposed as industry-wide
21 regulations to essentially settle -- they act as
22 partial settlements of the Web III case and it

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1 actually settles a sector -- settles the issues for a
2 sector of the webcasting industry, so -- which I think
3 is encouraged by Congress under the statute and it's
4 certainly, you know, welcomed to SoundExchange, who
5 litigates these cases all the time before Your Honors,
6 as you well know.

7 So if SoundExchange can make a settlement
8 that provides a reasonable basis for industry-wide
9 regulations, SoundExchange would certainly want to
10 have that adopted and, therefore, obviate the need to
11 continue to litigate those issues in this proceeding.
12 It actually acts as a settlement. And so if this were
13 adopted as the regulations, it would certainly be our
14 position that there's no need to continue litigating
15 with IBS over a noncommercial educational rate.

16 JUDGE ROBERTS: Let me follow-up. You said
17 something earlier about proposed settlements and I
18 want to be clear that I understand what your position
19 is.

20 MR. DeSANCTIS: Uh-huh.

21 JUDGE ROBERTS: I believe I heard you say
22 earlier that if you propose a settlement, we publish

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1 it in the Federal Register, it didn't get any comments
2 opposing the settlement, unless there is one or more
3 provisions in the settlement, we're bound to accept
4 it? Is that what you said or are now saying?

5 MR. DeSANCTIS: Yes, that would be my
6 position. And I think that's consistent both with the
7 statute and with the register decision from the
8 mechanicals case interpreting the relevant portion of
9 the statute.

10 JUDGE ROBERTS: Now let me ask you a
11 follow-up question to that.

12 If you propose a regulation that's got
13 confusing language in it, no one in the public
14 comments, it's not contrary to law but it's confusing
15 at best or perhaps just doesn't make a lot of sense,
16 are we still obligated to put it in the regulations?

17 MR. DeSANCTIS: Your Honors, first of all,
18 SoundExchange -- we don't see this provision as being
19 critical to this deal and if Your Honors excised it, I
20 think the deal still stands on its own two feet as
21 industry-wide regulations without this provision, and
22 it would be similar to the way Your Honors excised

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1 certain other provisions before it was even published.
2 There were a couple of provisions in each of the deals
3 that Your Honors deleted. And I think those kinds of
4 issues are within the Court's authority to -- the way
5 the Court phrased it was, and this is actually in the
6 Federal Register publication, was these are things
7 that are sort of not relevant to the statutory
8 license. And I think if something were unnecessary
9 and only caused confusion, which I'm not necessarily
10 saying this does, I think this provision served a
11 purpose, but I think that would be important.

12 CHIEF JUDGE SLEDGE: Any other questions?

13 JUDGE ROBERTS: No.

14 CHIEF JUDGE SLEDGE: Anything else? Are you
15 through?

16 MR. DeSANCTIS: Yes, Your Honor.

17 CHIEF JUDGE SLEDGE: All right.

18 Mr. Malone?

19 MR. MALONE: Thank you, Your Honor.

20 If Your Honor please, the issue here I think
21 is more significant than merely that of confusion.

22 I think Mr. DeSanctis' last remarks indicate

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1 that this is an attempt to freeze IBS out of statutory
2 rights to a decision from the Board on the record.

3 My understanding is, from him, is that the
4 intent is to settle two of the parties on this issue
5 but not the third, who will be foreclosed, although
6 he's not a party to the agreement, he's not a party to
7 the motion and he's really got no redress as to
8 what -- his ability to show the Court on the record
9 why terms such as these are not fair and not in accord
10 with the statute.

11 CHIEF JUDGE SLEDGE: Well, let's be a little
12 bit more precise than that. Fairness is not an issue.
13 The only issue is whether we conclude that the
14 agreement provides a reasonable basis for statutory
15 rates and terms.

16 MR. MALONE: Well, I think if one looks at
17 the total statutory scheme here, one reaches a
18 somewhat different conclusion. The question I have
19 and I think --

20 CHIEF JUDGE SLEDGE: The conclusion of what
21 I said or conclusion of what?

22 MR. MALONE: Well, that there was not a

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1 fairness issue here. We contend there's a very potent
2 fairness issue here.

3 CHIEF JUDGE SLEDGE: Well, I'm not going to
4 follow what you say. I'm going to follow what the
5 statute says.

6 MR. MALONE: I hope so, Your Honor.

7 CHIEF JUDGE SLEDGE: And the statute says
8 that it's adopted unless we conclude that the
9 agreement does not provide a reasonable basis for
10 setting rates and terms.

11 MR. MALONE: But I think, Your Honor, that
12 if -- again, the timing, the sequencing of this has a
13 lot to do with it. But if you terminate Web III as to
14 this issue, which is the, you know, the proper
15 decision on the record, then we've been frozen out of
16 an opportunity to object to such terms as these in the
17 evidentiary hearing.

18 CHIEF JUDGE SLEDGE: Mr. Malone, don't waste
19 your time or ours agreeing or disagreeing with the
20 statute. Spend your time arguing what your position
21 is under the statute. If you wish the statute had
22 said something else, then you're talking to the wrong

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1 people.

2 MR. MALONE: Well, then I'm afraid I'm not
3 being understood, Your Honor. I take it that the
4 statute here is governing.

5 Now, I think you're citing one particular
6 section of the statute which is invoked by a
7 settlement, but this is not a settlement in the sense
8 that we've agreed to anything. I mean you've got
9 three parties in the Web III proceeding on this issue.

10 CHIEF JUDGE SLEDGE: And the statute
11 provides for settlements to be reached by one or less
12 than all the parties. It doesn't require a settlement
13 to be reached by all the parties.

14 MR. MALONE: All right. But I think it does
15 raise the threshold as to the level of examination
16 that the Court should give because you are cutting off
17 the hearing on the record.

18 CHIEF JUDGE SLEDGE: As to whether it's
19 reasonable or not?

20 MR. MALONE: Yes, that's right.

21 CHIEF JUDGE SLEDGE: Now you're fitting into
22 the statute.

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1 MR. MALONE: Thank you, Your Honor.

2 And I come with a more fundamental question
3 I guess in the sense of whether this is necessary. If
4 you look where the parties were, you know, at the date
5 of the Federal Register -- publication by the
6 register, the two parties between themselves had
7 everything to settle the issue between them, but
8 what -- and, you know, it's put out there on public
9 notice, it's sort of a most-favored nation provision
10 or you might say it's a provision against
11 discrimination under Section 2(b) of the
12 Robinson-Pactman Act in the sense that this is
13 available to everybody who chooses to elect in by mere
14 fact of publication under 114(f)(5).

15 Now, what they've done is they've tried to
16 gild the lily here by coming in also with the same
17 agreement under 801(b)(7), and the question is what's
18 the motive here other than to freeze out IBS, which,
19 as you know, has chosen to take a different tack
20 toward the problem and presented a different case to
21 the Board. And, you know, I don't see any advantage
22 at all to CBI by proceeding additionally against

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1 801(b)(7). They've got the agreement if the members
2 agrees to it, but, you know, they don't need to ask
3 this Court under -- to proceed under 801(b)(7).
4 They've got it.

5 Now, the one thing that -- and, you know, it
6 may not even be a settlement between two parties in
7 the sense that if -- we are hearing -- if CBI is
8 satisfied with this agreement, they have no standing
9 to ask for something more. And, you know, the effect
10 is to bind an unrelated third party to the agreement,
11 and I just --

12 CHIEF JUDGE SLEDGE: And that's what the
13 statute says that it may do.

14 MR. MALONE: Well, I think it raises the
15 threshold as to, you know, whether it's reasonable or
16 not to proceed in this fashion.

17 We also think, as to SoundExchange, they, of
18 course, would like to get out of this hearing on this
19 issue, but, in addition, it may have the effect of
20 bypassing the precedential ruling of the Court of
21 Appeals in Web II that, you know, there's got to be
22 some justification for imposing the \$500 minimum. And

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1 it -- this is an interesting agreement because it has
2 an explicit nonprecedential -- precedential clause in
3 it. So that the -- and so this might look as though
4 it were a marketplace willing buyer/willing seller
5 rate \$500, and, again, I think that that's not where I
6 see the Court going.

7 The Court's precedent, as I understand it,
8 says there's got to be reasonableness in the -- there
9 must be record support, if you will, in any kind of
10 minimum rate.

11 This agreement also --

12 CHIEF JUDGE SLEDGE: Mr. Malone, on that
13 last point, it appears to me that CBI is acting
14 opposite of what you said. You said that they're
15 seeking to have their agreement be nonprecedential.

16 MR. MALONE: I'm sorry, I was misunderstood.

17 CHIEF JUDGE SLEDGE: But they have, in fact,
18 asked that it be adopted as regulations, which means
19 that they're asking that it be precedent.

20 MR. MALONE: Well, indeed, I think that it's
21 not CBI that is interested in that as much as
22 SoundExchange is, and I think the reason they may be

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1 interested in it, and this is speculation on my part,
2 is that it gives them an actual agreement between a
3 webcaster and SoundExchange as to, for instance, the
4 \$500. And that, of course, then provides the basis or
5 might be argued to provide the basis for this Court
6 to, when the Webcasting III rules, adopt \$500. It's
7 not justified by cost or some other reason. It merely
8 is a benchmark, and --

9 JUDGE WISNIEWSKI: Well, Mr. Malone, what
10 does that have to do with submitting this agreement
11 for approval?

12 They could simply put the agreement into the
13 record in Web III for that purpose without having it
14 be approved.

15 MR. MALONE: Well, I agree, Your Honor,
16 except that the --

17 CHIEF JUDGE SLEDGE: Which they've done.

18 MR. MALONE: -- except that the 114(f)(7),
19 as I recollect, that it has a basis -- it has a caveat
20 in it that these agreements are not precedential. So
21 the agreement of the parties as to that issue does not
22 have the effect that the statute does.

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1 CHIEF JUDGE SLEDGE: You've misstated the
2 statute, Mr. Malone.

3 MR. MALONE: All right. Sorry.

4 JUDGE ROBERTS: I think we're getting a
5 little confused on use of the word or the term
6 "nonprecedential" because we've been talking about
7 that in Webcaster III in the context of agreements
8 reached under the Webcaster Settlement Act. And, as I
9 recall, that when this CBI agreement was first offered
10 to us there was a clause in it about how the terms of
11 it would not be precedential in a future proceeding,
12 and we took that provision out when we published it.

13 So is that the provision that you're
14 referring to, not the nonprecedential clause with
15 respect to the Webcaster Settlement Act?

16 MR. MALONE: Well, except for the fact that,
17 Your Honor, it is still an agreement that was between
18 these two parties, that was signed by them --

19 JUDGE ROBERTS: Yes.

20 MR. MALONE: -- and so I think that the
21 problem continues.

22 JUDGE ROBERTS: I'm not sure what the

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1 problem is here.

2 MR. MALONE: The problem, Your Honor, as we
3 see it, is that by making this agreement -- by having
4 it published under the Webcaster Settlement Act, it
5 then -- and by making it public, not subject to
6 restrictions and quote-unquote settlement, they had
7 hoped to be able to cite this in the event the issue
8 remained in Webcasting III as a marketplace precedent,
9 which is, arguably, one basis on which this Court can
10 incorporate that into the Webcasting III order.

11 JUDGE ROBERTS: So you're really using that
12 term in a third context? Of course they won't have
13 to -- if we adopted the agreement as they proposed it
14 and they now tell us that it would be binding on
15 everyone, we wouldn't have to be citing, or they
16 wouldn't have to be citing it as precedent. It would
17 already, by operation, be adopted, would it not?

18 MR. MALONE: Absolutely, correct, Your
19 Honor.

20 JUDGE ROBERTS: Okay. So we don't need to
21 worry about precedential.

22 Maybe in future proceedings it could be

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1 cited as well \$500 is the lowest you can go, but
2 that's something for another day, yes?

3 MR. MALONE: Well, I think the question is,
4 though, as to whether we're foreclosed by an agreement
5 between two of the three parties in the proceeding.

6 JUDGE ROBERTS: I understand your argument
7 on that.

8 MR. MALONE: Thank you.

9 I think the other thing remaining, which is
10 not strictly germane to the question we've been
11 discussing, and that is that we see the agreement as a
12 concession by SoundExchange that the value of census
13 reporting as to stations such as this is a hundred
14 dollars because of the provision here which says you
15 can opt out of census reporting by paying over an
16 extra hundred dollars. And that certainly is relevant
17 to the census reporting rules that this Court has
18 under consideration in a collateral rule-making
19 proceeding and it also I think affects the balance in
20 Web III as to whether there should be census reporting
21 in the absence of a hundred dollar buyout.

22 When you get to the instance of the

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1 cost-benefit ratio, why, the cost is just, as the
2 testimony shows, the cost has been -- well, it's been
3 prohibitive in some cases, prohibitive over \$100
4 value, and we don't think that that is what Congress
5 had in mind in terms of rates set by this Court.

6 I think that covers the points I wanted to
7 make.

8 JUDGE WISNIEWSKI: Actually can I follow-up
9 with you, Mr. Malone?

10 You mentioned two specific objections to
11 this agreement. When I say "specific," I mean in
12 terms of the actual terms, written terms of the
13 agreement. One being the \$500 minimum fee and the
14 other being the hundred dollars that you were just
15 talking about in lieu of census reporting.

16 Are there any other specific provisions of
17 this proposed settlement that you object to?

18 MR. MALONE: May I answer your question this
19 way, Your Honor: That the argument that IBS has been
20 putting forward is that for many of its smaller
21 stations, both high schools and colleges, the \$500 is
22 prohibitive, is a nonstarter with them, and, you know,

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1 it basically cuts off their right to speak via the
2 Internet as part of their speeches and music lyrics
3 and something like that. And so there's I think that
4 problem that we see with this Court imposing in this
5 Web III or in the collateral rule-making proceeding,
6 which is -- there is still no final order, and I think
7 that the Board needs to look at that valuation that
8 SoundExchange has apparently agreed to, as to the
9 value of census reporting by stations of this class.
10 And I think that -- and there was also some testimony
11 by Ms. Kessler --

12 JUDGE WISNIEWSKI: Not to cut you off,
13 Mr. Malone --

14 MR. MALONE: Yes, sir.

15 JUDGE WISNIEWSKI: -- but I understand that
16 that's one of the two objections that you have raised,
17 specific objections that you have raised to the
18 language of the proposed settlement.

19 Are there any other specific language
20 objections that you have to the proposed settlement?

21 MR. MALONE: No. I think as long as it's
22 understood that our principal point here is that this

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1 is trying to short circuit the opportunity to show to
2 this Court that it does not take care of the whole
3 class of noncommercial educational webcasters that it
4 purports to take care of because for some they're
5 simply foreclosed from going under those regulations
6 because they couldn't possibly raise the money and --

7 JUDGE WISNIEWSKI: Thank you, sir.

8 CHIEF JUDGE SLEDGE: Go ahead, Mr. Malone.

9 MR. MALONE: I think that concludes my
10 remarks if the bench has no further questions.

11 CHIEF JUDGE SLEDGE: Thank you, sir.

12 Mr. Oxenford, as a participant in this
13 proceeding, anything to present on the motion to adopt
14 the settlement?

15 MR. OXENFORD: No, Your Honor, we didn't
16 take any position on this motion.

17 CHIEF JUDGE SLEDGE: All right. We'll
18 recess ten minutes.

19 (Brief recess.)

20 CHIEF JUDGE SLEDGE: Thank you. We'll come
21 to order. Mr. Stoltz, anything further?

22 MR. STOLTZ: Yes, Your Honor, we'd like the

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1 opportunity to respond to several points that were
2 raised by Mr. Malone from IBS, and it's my
3 understanding SoundExchange also wishes to respond.

4 CHIEF JUDGE SLEDGE: All right.

5 MR. STOLTZ: Your Honors, regarding the two
6 specific objections that Mr. Malone raised in this
7 hearing, CBI objects on the basis that we had no
8 notice of those specific objections until today.

9 The settlement was published in the Federal
10 Register on April 1st. Comments and objections were
11 due on April 22nd. IBS filed a statement on
12 April 22nd and that statement did not contain either
13 of these two objections that Mr. Malone raised today.
14 So as of this morning, we had no notice of them.

15 We wanted to emphasize the point that should
16 the Board consider those two objections to specific
17 terms of CBI and SoundExchange's proposal, we want to
18 emphasize the point that the proposal was agreed on as
19 a whole rather than as a collection of individual
20 terms. So while a \$500 minimum standing in a vacuum
21 may, depending on the remainder of the set of terms,
22 may be reasonable or unreasonable, in this case both

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1 College Broadcasters and SoundExchange believe and
2 mutually agreed and mutually move the Board to find
3 that those terms in toto are reasonable.

4 Also, I just had a clarification
5 regarding -- I think there may have been a confusion
6 between the CBI settlement and the NAB settlement.

7 The CBI settlement does not request that it
8 be nonprecedential. There's no reference to that in
9 the CBI settlement.

10 That's all I have. I'm happy to take
11 questions.

12 JUDGE ROBERTS: I have a question for you.
13 Is Mr. Malone right, that your agreement is looking to
14 freeze out IBS from Webcasting III?

15 MR. STOLTZ: We're certainly not intending
16 to preclude IBS from -- I'm sorry, Your Honor, let me
17 restate that.

18 The statute and, as we understand it, the
19 intent of Congress is to encourage settlement and
20 avoid the need for protracted litigation.

21 It is CBI's and, we understand,
22 SoundExchange's intent to, having settled, avoid

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1 litigation as to noncommercial educational webcasters.

2 JUDGE ROBERTS: Yes.

3 MR. STOLTZ: That is our intent.

4 JUDGE ROBERTS: Okay. But I haven't heard
5 you answer my question.

6 Why isn't Mr. Malone right that you're
7 freezing him out if this were to be adopted?

8 MR. STOLTZ: Well, I wouldn't characterize
9 it in those terms, Your Honor, but the statute
10 contemplates that less than all the parties can reach
11 a settlement and that the Court can adopt that
12 settlement as binding regulation.

13 JUDGE ROBERTS: Yeah. Is that reasonable?
14 If you have three parties litigating in a proceeding
15 and parties A and B come to a settlement and submit
16 it, the Board is supposed to accept it so that party C
17 is left out; is that reasonable?

18 MR. STOLTZ: Yes, it is, Your Honor, with
19 the additional condition that the Board decides that
20 the settlement reached is a reasonable one for all
21 those whom it affects, that is, noncommercial
22 educational webcasters.

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1 JUDGE ROBERTS: But is it reasonable to
2 proceed in that fashion?

3 MR. STOLTZ: I don't think that's a relevant
4 question, Your Honor. The statute allows the Board to
5 proceed in that fashion.

6 JUDGE ROBERTS: It allows us to proceed in
7 that fashion, but I'm asking you if that's reasonable.

8 MR. STOLTZ: We believe it is.

9 JUDGE ROBERTS: All right.

10 CHIEF JUDGE SLEDGE: Thank you.

11 Mr. DeSanctis?

12 MR. DeSANCTIS: Just a couple of very brief
13 points if I may. Thank you. Thank you, Your Honors.

14 And just very quickly, I'll try not to
15 repeat what Mr. Stoltz said or belabor the points too
16 long, but, number one, Mr. Malone claimed when he was
17 standing here that his two objections are to the \$500
18 minimum and to the hundred dollar fee for proxy
19 reporting. Actually he submitted written comments on
20 April 22nd per this Court's order. Even if those were
21 literally construed as objections, neither of these
22 are in there, so we think those objections are

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1 improper. They also just have absolutely no basis in
2 the record.

3 Mr. Malone's issue on the hundred dollar
4 point wasn't even really an objection to it. He was
5 just commenting on whether it indicates the value of
6 census reporting, and it certainly does not. It's
7 explained right in the provisions of the settlement
8 that that is to fund a proper proxy analysis that
9 would actually entitle SoundExchange to distribute
10 more money more accurately than the two-week sampling
11 that might otherwise apply.

12 He objects now improperly to the \$500
13 minimum fee. There's no evidence in the record that
14 members of IBS can't afford \$500 and that it's
15 unreasonable. In fact, all the evidence in the record
16 suggests that, at least the members that he put on,
17 the witnesses that IBS put on, certainly can afford
18 that with profits in the tens of thousands of dollars.

19 It is not a violation of free speech that
20 one has to pay to use copyrighted music regardless of
21 what Mr. Malone's clients may think to the contrary.
22 Over two dozen college radio stations submitted

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1 comments to this court by April 22nd supporting the
2 deal. I think that speaks volumes for its
3 reasonableness.

4 And, finally, to get to the point that Your
5 Honor was asking, Judge Roberts, and that Mr. Malone
6 started with, that he's somehow being frozen out of
7 this unfairly, I really want to address that because
8 it's extremely important to SoundExchange.

9 It is precisely what Section 801(b)(7)(a)
10 allows. Settlements that are reached by less than all
11 of the participants can be submitted to this Court for
12 adoption as industry-wide rates and terms unless
13 there's no reasonable basis for doing so or, another
14 way, if there is a reasonable basis -- if the
15 settlement provides a reasonable basis for adoption as
16 such. It's really important that that provision is in
17 there. And this case shows just how important it is.
18 It is designed in order to make these proceedings
19 efficient.

20 SoundExchange reached very reasonable
21 settlements with many, many parties, and they were
22 extremely proud of the settlements that they made in

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1 this case, not just with noncommercial educational
2 webcasters but with broad sectors of the industry, as
3 Congress very much seemed to want, and that's good for
4 the entire industry.

5 It made reasonable settlements specifically
6 with College Broadcasters through CBI, and it's
7 precisely that point that, at least to us, what
8 801(b)(7)(a) is trying to prevent, is that a single
9 holdout who comes into Court with an unreasonable
10 theory and objecting to reasonable rates that everyone
11 else in their sector of the industry has agreed to can
12 put SoundExchange through an entire proceeding of this
13 Court and put Your Honors through an entire proceeding
14 of this Court when there is a very reasonable basis
15 already out there that can be adopted by this Court as
16 industry-wide regulations.

17 That efficiency is exactly what we think
18 Congress intended in Section 801(b)(7)(a), it's
19 exactly what SoundExchange was trying to accomplish
20 here, and is it reasonable, Judge Roberts, you kept
21 asking, absolutely. Not only is it reasonable, I
22 would posit that it is entirely unreasonable to let

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1 one holdout who comes into Court with an entirely
2 unreasonable position waste Your Honors' resources,
3 which, of course, are federal resources of the
4 country, and to waste SoundExchange's time and
5 resources litigating issues against holdouts. I think
6 that's what the statute was intended for and that's
7 what SoundExchange is hoping to take advantage of
8 here.

9 JUDGE ROBERTS: Let's explore that a second,
10 Mr. DeSanctis.

11 Let us assume a webcasting proceeding to set
12 commercial rates. Ten commercial webcasters,
13 including SoundExchange, file direct cases. So
14 SoundExchange is one of the ten to litigate the
15 proceeding. SoundExchange finds one of the webcasters
16 negotiates a settlement, submits it to us. That
17 leaves eight webcasters that are not part of the
18 settlement.

19 Is it reasonable for us at that point in
20 time to terminate the proceeding and adopt the
21 settlement?

22 MR. DeSANCTIS: In theory, yes. I think it

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1 would depend on the record in the case.

2 If the settlements that was made didn't have
3 indicia of being a reasonable basis for the adoption
4 of industry-wide rates and terms, then no. And, of
5 course, those other participants, the eight or nine
6 other webcasters, have an opportunity to file
7 objections and to actually make a record as to what
8 about that settlement does not provide a reasonable
9 basis for industry-wide rates and terms. If --

10 JUDGE ROBERTS: Isn't that the point of the
11 proceeding though?

12 MR. DeSANCTIS: I think it's the point of
13 this proceeding. This hearing today actually is to
14 see whether there are credible objections that were
15 made timely with evidence that something about these
16 deals are unreasonable. Otherwise -- I think that's
17 exactly what Congress intended so that these --
18 Congress clearly favors settlements. And I think
19 it -- I think it is what Congress intended, that that
20 is exactly what happens if the record shows that the
21 settlement reached does provide a reasonable basis
22 and, of course, that's what Your Honors are to decide.

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1 But if Your Honors decide that it does provide a
2 reasonable basis for industry-wide rates and Your
3 Honors are not swayed by any objections made by other
4 participants, then yes, I think that that would be
5 what --

6 JUDGE ROBERTS: Isn't that inviting
7 proceedings before the real proceeding?

8 You said that the other, in my hypothetical
9 question, that the other eight webcasters would have
10 their opportunity to make objections to the
11 settlement. Presumably one of those objections is
12 going to be you have to hear our evidence. We have
13 witnesses that are going to come in and testify and
14 show how the proposal is wholly unreasonable.

15 Where does that leave us at that point? To
16 conduct a proceeding before the proceeding and say all
17 right, let's bring in these witnesses?

18 Isn't it more appropriate and more
19 envisioned by the Congress that we have what Chapter 8
20 provides, and that is a proceeding to decide these
21 matters?

22 MR. DeSANCTIS: Well, I don't think so. The

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1 only evidence we have of Congress' vision is the text
2 in the statute and the text of the statute in
3 801(b)(7)(a) clearly provides for industry-wide
4 adoption of these kinds of settlements in this
5 situation.

6 I think Your Honors could have a, you know,
7 a hearing like you had today, which as far as I'm
8 aware hasn't been done before. I think that's
9 something that can be done any time such a settlement
10 is proposed.

11 If, you know, if relevant witness testimony
12 wants to be provided, I suppose that could be. You
13 wouldn't need experts and everything else because the
14 point wouldn't be what is the right rate, the point
15 would be a settlement has been reached, there's no
16 evidence of it being a charade or illusory, this was
17 freely negotiated and, therefore, is there any reason
18 why it doesn't provide a rational basis.

19 JUDGE ROBERTS: Now, let's go further on
20 that though.

21 If that's the proper procedure under the
22 statute, then the way I see this potentially working

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1 out is SoundExchange reaches an agreement with one of
2 those nine webcasters, proposes it, the standard for
3 us to evaluate the proposal, which would be binding on
4 all the webcasters, all nine of the webcasters, would
5 be reasonableness. It would not be the willing buyer
6 and the willing seller. And is that what Congress
7 intended; that let's have this proceeding be about
8 reasonableness and willing buyer and willing seller?
9 We just don't ever get to that.

10 MR. DeSANCTIS: Again, all I have to go on
11 is the words of the statute in terms of what Congress
12 intended, but I think they did intend just that. And
13 one might ask what a wonderful world that might be if
14 we didn't have to have protracted willing buyer/
15 willing seller proceedings, you know, year after year.
16 It would actually be much more efficient.

17 JUDGE ROBERTS: Well, I think what you're
18 saying is it's a wonderful world if you happen to be
19 the one that's proposing the settlement. If you're
20 the one that's not part of the settlement and you're
21 sitting there saying I have all my witnesses, my
22 testimony, I am willing to show what a willing buyer

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1 and a willing seller would negotiate in the
2 marketplace, you would never get that opportunity to
3 do it.

4 MR. DeSANCTIS: Well, presumably whatever
5 webcasters settled wouldn't settle on unreasonable
6 terms.

7 JUDGE ROBERTS: I don't know that. I
8 wouldn't know that.

9 MR. DeSANCTIS: Right, and that's why one
10 can have a hearing to say is there something about
11 this deal that makes us think that it would not
12 provide a reasonable basis. Is it, you know, one tiny
13 webcaster out of a hundred who are ready here to put
14 on evidence or is it actually half the market of the
15 industry sector that we're looking at? Is it, you
16 know -- I don't profess to be able to tell you what
17 those standards would be, but presumably there are any
18 number of ways that one could have a reasoned inquiry
19 into whether a particular settlement actually might
20 not provide a reasonable basis, and perhaps the
21 numbers that you just described might be a factor in
22 that determination.

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1 JUDGE ROBERTS: How can I know what is the
2 reasonable basis if I don't hear the other side's
3 proposals under the willing buyer and the willing
4 seller stand?

5 I'm hearing you to say that, in the
6 hypothetical question I put to you, if SoundExchange
7 negotiates with that webcaster and the webcaster comes
8 forward to SoundExchange and says this is reasonable
9 to me, we're willing to pay this and we're in this
10 business and, therefore, you should adopt it because
11 it's reasonable as far as we're concerned.

12 MR. DeSANCTIS: Uh-huh.

13 JUDGE ROBERTS: And I hear you to say yeah,
14 then the Board should go ahead and adopt it.

15 MR. DeSANCTIS: Yes.

16 JUDGE ROBERTS: That's what you're saying?

17 MR. DeSANCTIS: It is unless there's a
18 reason why Your Honor thinks it's not reasonable. Of
19 course, then it would be your job not to adopt it as
20 industry-wide standards.

21 I think what is equally unreasonable and
22 inconsistent with 801(b)(7)(a) is that there can be

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1 very reasonable settlements reached with the entire
2 industry except two and then you have a proceeding
3 like this one. That's -- you know, I think the other
4 side of the coin is equally unreasonable and if
5 Congress hadn't addressed it, I'd be wasting my breath
6 up here trying to convince Your Honors that that's
7 what you should do. But Congress did address it, and
8 I think that shows that Congress did care and wanted
9 to foreclose those kinds of unreasonable proceedings.

10 You suggested a different extreme at the
11 other end of the spectrum, Judge Roberts.

12 JUDGE ROBERTS: Yes.

13 MR. DeSANCTIS: And where that line is, is
14 why you all are wearing the robes and I'm just making
15 arguments. And I think the hearing today is an effort
16 at ferreting out whether objections made are warranted
17 and whether settlements proposed are reasonable.

18 JUDGE ROBERTS: All right.

19 MR. DeSANCTIS: Nothing further, Your
20 Honors.

21 JUDGE WISNIEWSKI: Just before you go,
22 Mr. DeSanctis, I'm reminded that the settlements

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1 proposed the 112 rate.

2 MR. DeSANCTIS: Yes, sir.

3 JUDGE WISNIEWSKI: And I trust that you all
4 are still on schedule to provide the brief that I
5 asked for?

6 MR. DeSANCTIS: Very much on schedule, Your
7 Honor.

8 JUDGE WISNIEWSKI: Thank you.

9 MR. STOLTZ: Your Honor, may I respond to
10 the question just raised by Judge Roberts?

11 CHIEF JUDGE SLEDGE: No.

12 Mr. Malone?

13 MR. MALONE: Yes, Your Honor.

14 CHIEF JUDGE SLEDGE: Anything further?

15 MR. MALONE: Yes, Your Honor.

16 In Mr. DeSanctis' last remarks about the
17 holdout against all of the rest of the industry he
18 posits the case where you all know about and that the
19 proponents of the agreement represent the whole rest
20 of the industry.

21 We're prepared to show from the testimony of
22 the witnesses that CBI is a minority player in the

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1 market, as Mr. DeSanctis has characterized it, and
2 that, in fact, IBS represents a much larger number of
3 educational webcasters. And, you know, as Your Honor
4 is aware from our opening statement, if not otherwise,
5 our contention is how this agreement simply leaves us
6 nowhere to go, so I don't think that is reasonable.

7 JUDGE WISNIEWSKI: Mr. Malone, can I ask
8 you, that being the case, why haven't we had any
9 comments from any of the individual webcasters that
10 are members of IBS who object to this?

11 MR. MALONE: Well, Your Honor, our feeling
12 was that this -- since this was a proceeding on the
13 record, that we would have the problem of
14 authentication of that. We certainly were not willing
15 to attempt to bring in from all over the country a
16 wrath of small student stations strapped.

17 Now, we did put on Mr. Murphy, the former
18 president of IBS, who testified to the interaction
19 that he had had over the years with the attendees at
20 the IBS conventions, and he did I think make a fairly
21 clear case for the proposition that most of these
22 stations, the smaller ones at least, had no financial

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1 basis for paying the \$500. And --

2 JUDGE WISNIEWSKI: Perhaps I'm not being
3 clear in my question, but my question was why is it
4 that none of these stations submitted written comments
5 as IBS did on the 22nd?

6 MR. MALONE: Well, if Your Honor please,
7 that does perhaps avoid the authentication issue, but
8 it also indicates that these stations were satisfied
9 with IBS' representation and, unlike CBI, we did not
10 solicit letters to the Board.

11 JUDGE WISNIEWSKI: Thank you.

12 CHIEF JUDGE SLEDGE: All right. Mr. Stoltz,
13 you said you had one more thing to say.

14 MR. STOLTZ: I did, Your Honor. On the
15 question that -- it was a very small point, Your
16 Honors, in further response to the question that Judge
17 Roberts asked Mr. DeSanctis.

18 The congressional record actually speaks
19 directly to the question of propriety of settlements
20 with less than all parties. This is the report from
21 the Committee of the Judiciary, the Copyright Royalty
22 and Distribution Act of 2003, page 24. Just very

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1 briefly it says: "Clause 1 allows other participants
2 in the relevant proceeding who would be bound by the
3 proposed settlement to object to the CRJ's adoption of
4 the agreement. When an objection has been registered
5 pursuant to Clause 1, Clause 2 gives the CRJ
6 discretionary power to decline to adopt such agreement
7 if they find based on the record before them that the
8 agreement is not likely to meet the relevant statutory
9 standard. Because settlement agreements can be
10 offered at any time before final disposition of a
11 proceeding, the extent of the record before the CRJs
12 may vary widely depending on the timing of the
13 settlement agreement. Bearing in mind the objective
14 of encouraging settlement, the CRJs are to use their
15 best judgment as to whether the record before them
16 indicates that the proposed agreement is not likely to
17 meet the relevant statutory standard."

18 I'd just like to submit that for the record.

19 CHIEF JUDGE SLEDGE: Thank you, Mr. Stoltz.

20 Anything else?

21 MR. MALONE: No, Your Honor.

22 CHIEF JUDGE SLEDGE: Well, that concludes

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1 the hearing and we'll review everything you've given
2 us and make a decision as soon as we can.

3 Thank you. We'll recess.

4 (Whereupon, the hearing was concluded at
5 approximately 11:37 a.m.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, SHARI R. BROUSSARD, the officer before whom
3 the foregoing hearing was taken, do hereby certify
4 that the testimony appearing in the foregoing pages
5 was taken by me in stenotypy and thereafter reduced to
6 typewriting under my direction; that said
7 transcription is a true record of the testimony given
8 by said parties; that I am neither counsel for,
9 related to, nor employed by any of the parties to the
10 action in which this hearing was taken; and, further,
11 that I am not a relative or employee of any counsel or
12 attorney employed by the parties hereto, nor
13 financially or otherwise interested in the outcome of
14 this action.

15

16

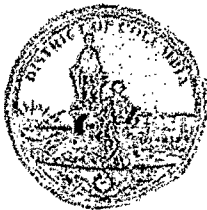
17

18

19

20

21 My commission expires:
22 July 14, 2010



Shari R. Broussard

SHARI R. BROUSSARD
Notary Public in and for the
District of Columbia

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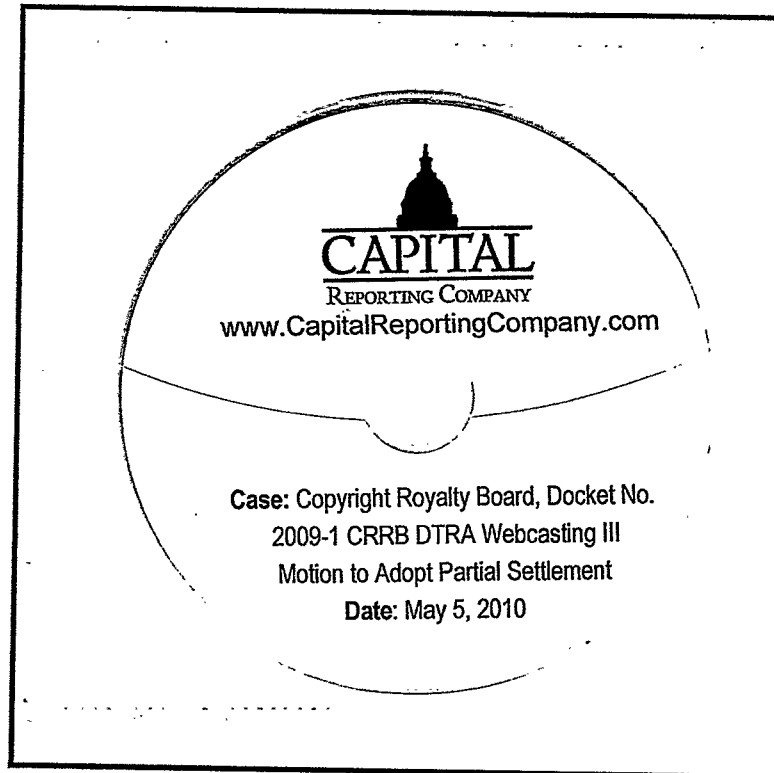
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